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Nos. 94-805, 94-806, and 94-988

In the Supreme Court of the United States

OCTOBER TERM, 1995

GEORGE W. BUSH, GOVERNOR OF TEXAS, ET AL.,
APPELLANTS

v.

AL VERA, ET AL.

REV. WILLIAM LAWSON, ET AL., APPELLANTS

v.

AL VERA, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

AL VERA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

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We argue in our opening brief (Br. 26-32) that Texas had a compelling interest in drawing one black opportunity district in Dallas County and one black and one Hispanic opportunity district in Harris County, because it had a strong basis in evidence for concluding that such districts were required by

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. We also argue (Br. 35-45) that the districts drawn by the State satisfy the narrow tailoring requirement of strict scrutiny. While the districts are irregular in shape, that approach was necessary in order for the State to comply with Section 2 while simultaneously protecting its incumbents. Finally, we argue (Br. 32-35) that the districts constitutionally serve the State's compelling interest in eliminating the effects of racially polarized voting. Nothing in appellees' response undermines the force of those arguments.

1. Appellees argue (Br. 46-47) that, before using race to draw district lines in order to comply with Section 2, a State must first create districts by following its customary districting practices. Only if that process results in a plan that violates Section 2, appellees contend, may the State use race in drawing district lines. This Court has consistently held, however, that a government can demonstrate a compelling interest in race-conscious action by showing "a strong basis in evidence of the harm being remedied." *Miller* v. *Johnson*, 115 S. Ct. 2475, 2491 (1995); *Shaw* v. *Reno*, 113 S. Ct. 2816, 2832 (1993); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Accordingly, if a State has a strong basis in evidence for concluding that it must create minority opportunity districts in order to comply with Section 2, it may include such districts in its redistricting plan from the outset. There is no requirement that a State go through the redistricting process twice before it may create minority opportunity districts in order to comply with Section 2.

2. Appellees argue (Br. 45-56) that the predicates for a Section 2 violation were not established in this

case, and that the State therefore could not invoke its compelling interest in complying with Section 2. As we explain in our opening brief (Br. 26-30), however, each of the three preconditions for a Section 2 violation was established (see *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986)), and the failure to draw one black opportunity district in Dallas County and one black and one Hispanic opportunity district in Harris County would have left minority voters in those areas substantially underrepresented when compared to their percentage of the population. The State therefore had a strong basis in evidence for concluding that three minority opportunity districts were required by Section 2.

a. Appellees contend (Br. 48-50) that the *Gingles* compactness requirement was not satisfied because the districts actually drawn by Texas are not compact. As this Court explained in *Gingles*, however, the sole purpose of the compactness requirement is to determine whether minority voters "possess the *potential* to elect representatives in the absence of the challenged structure or practice" and therefore "have been injured by that standard or practice." 478 U.S. at 50 n.17. For that reason, the relevant inquiry under *Gingles* is not whether a particular district actually drawn in order to comply with Section 2 is compact, but whether a reasonably compact district could have been drawn. *Id.* at 38. As this Court has stated, the compactness and numerosity precondition addresses "the *possibility* of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2655 (1994) (emphasis added).

In this case, the evidence shows that it was possible to draw one reasonably compact district in Dallas County that would have afforded black voters the potential to elect. U.S. Br. 26. The evidence also shows that, in Harris County, it was possible to draw either one reasonably compact district in which black voters would have had the potential to elect, or one reasonably compact district in which Hispanics would have had the potential to elect. *Id.* at 28-29. Appellees concede (Br. 66-67) that it was possible to draw such districts. The *Gingles* compactness requirement was therefore satisfied. See U.S. Br. 26-29.[1]

While framed in terms of the *Gingles* compactness requirement, appellees' real argument is that a State seeking to comply with Section 2 must include in its redistricting plan the geographically compact dis-

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[1] Appellees "doubt" that it was possible to draw a compact district in Harris County in which Hispanics would have constituted a majority of the citizen voting age population (CVAP). Br. 49 n.44. They also assert that there is no evidence that a compact majority black district could have been drawn in Dallas County. Br. 50 n.45. As we explain in our opening brief (Br. 24-25), this Court has reserved the question whether minority group members must constitute a CVAP majority in order to satisfy the first *Gingles* precondition, as well as the related question whether the first precondition would be satisfied by proof that the relevant minority group could constitute a sizable minority in a district and could elect candidates of their choice by attracting some cross-over votes. *DeGrandy*, 114 S. Ct. at 2655-2656. Because the "strong basis in evidence" standard permits a State to resolve uncertain Section 2 questions in favor of the reading that is more protective of minority voting rights, the State in this case was entitled to proceed on the assumption that the first *Gingles* precondition would be satisfied by a showing that it was possible to draw a district in which the relevant minority group would have had the potential to elect. *Gingles*, 478 U.S. at 50 n.17.

tricts that led it to conclude that Section 2 required it to create minority opportunity districts. As we discuss in our opening brief (Br. 30-32), however, so long as a State's plan affords minority voters an equal opportunity to participate in the political process and to elect representatives of their choice, Section 2 is satisfied; federal law does not require a State to meet its Section 2 obligations by drawing compact districts.

b. Appellees next assert (Br. 50-51) that voting in Dallas and Harris Counties is not racially polarized. One year before the legislature adopted the redistricting plan at issue here, however, a federal district court issued detailed findings concerning bloc voting in Dallas County. *Williams* v. *City of Dallas*, 734 F. Supp. 1317, 1387-1394 (N.D. Tex. 1990). That court specifically found that, "in a large number of both at-large and single-member district elections since 1977, the African-American vote was substantially polarized." *Id.* at 1389-1391. The court also found that "analysis of at-large elections since 1975 involving a serious African-American candidate shows that the choice of the African-American community has always been defeated by substantial white polarized bloc voting." *Id.* at 1394. Those findings justified the legislature's conclusion that racial bloc voting existed in Dallas County.[2]

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[2] Appellees contend (Br. 50 n.47) that the State was not entitled to rely on *Williams* because the court adopted an "extreme" interpretation of the Voting Rights Act. In support of that contention, appellees point to that court's failure to accord significance to the election of Hispanic City Council candidate, Al Gonzalez. The *Williams* court found, however, that Gonzalez was elected with substantial white backing in an attempt to head off a Section 2 challenge by Hispanic voters

There was also overwhelming evidence of racial bloc voting in Harris County. Expert testimony presented at trial established that, in state legislative and congressional elections in the area now covered by District 29, Hispanic candidates, on average, received 95% of the Hispanic vote, but only 2% of the white vote. J.A. 226. The 1992 Democratic primary in District 29 in which Gene Green, who is white, defeated Ben Reyes, who is Hispanic, illustrates the extent of polarized voting in that area. In that election, 99% of the Hispanic voters cast ballots for Reyes, while 91% of white voters cast ballots for Green. St. Exh. 14, App. 2, Table 8. Expert testimony also showed that the area now covered by District 18 also exhibited a high degree of polarization. 4 Tr. 187; J.A. 227. The legislature therefore reasonably concluded that voting in Harris County was racially polarized.

Appellees contend (Br. 50) that the Fifth Circuit's decision in *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831 (1993) (en banc), cert. denied, 114 S. Ct. 878 (1994), held that there is no racial bloc voting in Dallas or Harris Counties. That case, however, involved judicial elections, and the court of appeals' conclusion that party affiliation rather than race determined election outcomes was limited to that specific context. The court reasoned that "judicial elections are low-profile elections in which the voters know little more about the

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and that those "very atypical circumstances * * * will not reoccur." 734 F. Supp. at 1324-1325, 1327. The court therefore correctly concluded that voting in Dallas County is racially polarized and that the election of Gonzalez did not suggest otherwise. See *Gingles*, 478 U.S. at 75-76.

candidates than what they read on the ballot. The voters, therefore, will make their choice based upon the information that the ballot contains—party affiliation." 999 F.2d at 878-879. That analysis has no application to primary elections or high profile congressional elections.

Appellees' reliance (Br. 50) on *Morris* v. *City of Houston*, 894 F. Supp. 1062 (S.D. Tex. 1995), is similarly misplaced. In that case, the court examined four nonpartisan local elections in Houston and concluded that white voters supported Hispanic candidates in two of them. *Id.* at 1066. That small sample of nonpartisan elections for local office does not detract from the State's strong basis for believing that racially polarized voting exists in congressional elections in Harris County.

Appellees also attribute significance to the success of some minority candidates. Br. 55. Their discussion of those successes, however, is misleading. Appellees point to five minority candidates who have been nominated or elected to statewide office (Br. 3-4), but they fail to discuss whether voting in the elections for those candidates was racially polarized in Dallas and Harris Counties. For example, appellees cite the statewide success of Attorney General Morales. What appellees fail to mention is that, in the 1990 Democratic primary, Morales received 84% of the Hispanic vote, but only 14% of the white vote, in the area covered by District 29. St. Exh 14, App. 2, Table 8. Similarly, appellees note (Br. 4-5) that there are a significant number of blacks and Hispanics in the State's congressional and legislative delegations. Appellees fail to include any information, however, on the racial composition of the districts from which those legislators were elected. In fact, at

the time of redistricting, no black candidate had ever been elected to Congress or the state senate from a majority-white district in Texas, and only two black candidates had ever been elected to the state house from majority-white districts. St. Exh. 17, at 51-55. Similar data exist concerning the failure of Hispanic candidates to win elections in majority-white districts. J.A. 252; U.S. Exh. 1095 (letter dated Nov. 12, 1995, at 2). Appellees cite (Br. 4, 50) a table purporting to show that black candidates have been successful most of the time in districts in which blacks comprise between 40% and 50% of the population. Except in the two cases in which blacks prevailed in majority-white districts, however, there is no evidence that black success in those districts is attributable to white cross-over voting, rather than coalitions with Hispanic voters. And as we note in our opening brief (Br. 29-30), the black/Hispanic coalition had begun to break down at the time of the 1991 redistricting.

The evidence before the district court therefore supported the State's conclusion that voting in Dallas and Harris Counties is racially polarized, and that, absent special circumstances, minority voters in those counties would be unable to elect candidates of their choice in majority-white districts. Appellees cite no persuasive evidence to the contrary.[3]

c. Appellees next contend (Br. 56) that the drawing of an Hispanic opportunity district in Harris County

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[3] In arguing that there is not polarized voting, appellees repeatedly quote from a report that was not before the district court. Br. 2-5. They also rely on several newspaper articles that were not before the district court. Br. 5, 7. Because that evidence was not presented to the district court, it is not properly before this Court.

goes beyond what is necessary to prevent underrepresentation of the Hispanic citizen voting age population throughout the State. In this case, however, the State sought to prevent the dilution of the Hispanic vote *in Harris County*. For that purpose, the relevant proportional representation inquiry is whether the creation of an Hispanic opportunity district in Harris County was necessary to prevent the underrepresentation of Hispanics in Harris County. *DeGrandy*, 114 S. Ct. at 2662. As we discuss in our opening brief (Br. 30), if the State had not created an Hispanic opportunity district in Harris County, Hispanics in that area would have been substantially underrepresented. Appellees do not suggest otherwise.[4]

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[4] Appellees' argument (Br. 56) that Hispanics would have achieved statewide proportional representation, even absent the creation of an Hispanic opportunity district in Harris County, relies on a comparison to the Hispanic proportion of the State's CVAP (18.4%). The creation of an Hispanic opportunity district in Harris County was necessary to prevent statewide underrepresentation, however, if a comparison is made to the Hispanic proportion of total population (22.6%) or voting age population (VAP) (22.4%). This Court has not yet decided whether total population, VAP, or CVAP, should be used to measure the proportionality of representation. See *DeGrandy*, 114 S. Ct. at 2655-2656, 2660 n.14. Because the State's plan sought to forestall the dilution of the Hispanic vote in Harris County, that issue need not be resolved in this case. In Harris County, Hispanics constitute 23% of the total population (U.S. Br. 6), 20% of the VAP (U.S. Exh. 1084), and 13.3% of the CVAP. Under any of those measures, the creation of one Hispanic opportunity district in Harris County (which has sufficient population to support five districts) was necessary to prevent the underrepresentation of Hispanics in that area.

d. Appellees contend (Br. 53) that a violation of Section 2 cannot be established unless there is proof that minorities have been essentially shut out of the political process. The text of Section 2, however, prohibits all voting practices that provide minority voters with "less" opportunity to participate and to elect than other members of the electorate, not just those that shut out minority voters completely. 42 U.S.C. 1973(b). Consistent with the text of Section 2, this Court in *Gingles* rejected the interpretation suggested by appellees here. In that case, the Court affirmed a finding of vote dilution in violation of Section 2, even though black voters in some of the multimember districts at issue had been able to elect some candidates of their choice. 478 U.S. at 74-75 & nn.35-36. Even if appellees' standard were the correct one, it would not assist them here. If the State had not created minority opportunity districts in Dallas and Harris Counties, minority voters from those two areas would have been effectively shut out of any opportunity to elect a representative of their choice.

3. Appellees contend (Br. 60-68) that the districts at issue in this case do not satisfy the narrow tailoring requirement for two reasons. Neither is persuasive.

a. Appellees first contend (Br. 61-64) that a plan cannot be narrowly tailored unless it conforms to traditional redistricting criteria, such as compactness and respect for political subdivisions. Because strict scrutiny applies only when "the legislature [has] subordinated traditional race-neutral districting principles * * * to racial considerations," *Miller*, 115 S. Ct. at 2488, however, acceptance of appellees' narrow tailoring argument would mean that any district subject to strict

scrutiny would automatically fail the narrow tailoring prong of that inquiry. That result would be inconsistent with this Court's recent admonition that strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995). Appellees' argument that narrow tailoring requires adherence to traditional redistricting practices is also inconsistent with this Court's statement in *Shaw*, 113 S. Ct. at 2827, that a State is not constitutionally required to follow any particular set of traditional redistricting practices.

As we explain in our opening brief (Br. 36-37), a substantial departure from traditional redistricting practices may be evidence that a State has used race in drawing district lines more than is necessary to satisfy its compelling interests. In this case, however, no such inference was justified. Although the State's remedial districts are irregular in shape, those irregularities were necessary to create districts that complied with Section 2 while simultaneously serving the State's interest in protecting incumbents. See U.S. Br. 38.

At bottom, appellees' argument reduces to the contention accepted by the district court that a State seeking to comply with Section 2 is constitutionally required to give greater weight to compactness than to protecting incumbents. See J.S. App. 91. That contention conflicts with this Court's repeated holdings that the State has the power to establish its own redistricting priorities. See U.S. Br. 40-41 (citing cases). A requirement that a State give greater priority to compactness than to protecting incumbents would also create a substantial disincentive to voluntary compliance with Section 2. It is unrealistic to expect that States will comply voluntarily

with Section 2 if they must sacrifice their interest in protecting incumbents in order to do so. Appellees make no attempt to reconcile their position with this Court's decisions holding that States may determine their own redistricting priorities or with the strong policy in favor of voluntary compliance with the law.

b. Appellees also argue (Br. 64) that the challenged districts are not narrowly tailored because they do not "substantially include the particular minority voters whose constitutional and statutory rights they are designed to protect." That argument is without merit. The minority voters whose Section 2 rights the State has sought to protect are blacks in Dallas County, blacks in Harris County, and Hispanics in Harris County, and the State's remedial districts include a sufficient number of those voters to permit each group to have the potential to elect a candidate of its choice. It is true that not all members of those groups are in the State's remedial districts. But that is almost always true in vote dilution cases. See *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989); *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 (4th Cir. 1988); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 380-384 (E.D.N.C. 1984) (three-judge court), aff'd in part, rev'd in part *sub nom. Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Such a result is "a necessary concomitant of the inevitably rough-hewn, approximate redistricting remedy," in which some members of a politically cohesive minority group benefit directly by being included in a remedial district, while others benefit indirectly by having their distinctive interests taken into account by the person elected from the remedial district. *McGhee*, 860 F.2d at 118-119 & n.9.

Appellees contend (Br. 65-66) that the class of Section 2 victims is limited to those minority voters who reside in the area in which members of the minority group are most highly concentrated, and that the State's remedial districts do not substantially include those voters. The victims of vote dilution, however, are not just those persons who reside in the area in which minority voters are most highly concentrated; the victims include all members of the politically cohesive minority group. *McGhee*, 860 F.2d at 118-119 & n.9. In this case, the politically cohesive minority groups are blacks in Dallas County, blacks in Harris County, and Hispanics in Harris County.

In any event, the State's remedial districts include substantial numbers of those persons who reside in the areas in which minority voters are most highly concentrated. As appellees note (Br. 65), the minority community in Dallas County is most heavily concentrated in South Dallas. That community forms the core of District 30. See J.A. 335. In fact, virtually all of the areas of high black population concentration (more than 70% black population) in South Dallas are in District 30. See *ibid.*; J.A. 150. The situation is similar in Harris County. There are three principal areas of high black population concentration (more than 70% black population) in Central Harris County. J.A. 151. Under the State's plan, two of those areas are almost entirely located within District 18, and the third area is divided between District 18 and District 25. *Ibid.* In addition, virtually all areas of high Hispanic population concentration (more than 70% Hispanic population) in Central Harris County are located within District 29. J.A. 152. Thus, even under

appellees' proposed victim-specificity test, the State's remedial plan is narrowly tailored.

4. Finally, appellees argue (Br. 58-59) that the State had no interest independent of Section 2 in creating the minority opportunity districts at issue here. But as we explain in our opening brief (Br. 32-35), the creation of those districts furthers the State's compelling interest in ameliorating the effects of polarized voting and preventing substantial underrepresentation of blacks in Dallas County and blacks and Hispanics in Harris County. Appellees seek to disparage the State's attempt to ameliorate the effects of polarized voting by labeling it an attempt to remedy societal discrimination. Br. 58-59. That characterization is incorrect. As we explain in our opening brief (Br. 34), the State could reasonably conclude that the severe racial bloc voting present in the State today is attributable, at least in part, to the State's long history of discrimination in voting. The State could also reasonably regard bloc voting as evidence of racial discrimination practiced by private parties. *Ibid.* In seeking to ameliorate the consequences of polarized voting, the State was therefore attempting to remedy concrete discrimination and its continuing effects, not amorphous societal discrimination.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed or, alternatively, the judgment should be vacated and the case remanded for a decision under the correct legal standards.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1995